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ANNEXATION IN COLORADO

A. Introduction and Historical Context

Annexation is the process by which municipalities incorporate new territory, either before or after development has taken place. Over 70% of the total population of Colorado lives within the boundaries of a municipality. A central fact of annexation today is that it means added revenue for the annexing municipality. This has led to competition between municipalities for desirable land. Annexation often, but not always, brings with it municipal utilities: water, sewer, electricity, police and other services.

Annexation can take place in three ways: (i) landowner petition (a contractual relationship which can be memorialized in an agreement separate from a petition); (ii) annexation election; or (iii) unilateral annexation of enclave or municipality owned land.

B. Sources of Colorado Annexation Law

1. Municipal Annexation Act of 1965: CRS 31-12-101 *et seq*.

   - Basic structure unchanged today: ***one-sixth boundary contiguity*** must exist between municipality and property to be annexed;
   - Petition or election process to initiate annexation;
   - Findings by the municipal governing body required.
   - *"No subject relating to municipal government aroused more interest or emphasis in the Committee's study than the matter of logical municipal growth through annexation. . . [p]roviding adequate urban services to ever growing unincorporated fringe areas constituted one of most important problems to Colorado municipal government . . . Annexation is recognized as an important vehicle to achieve logical urban development."* Report of the State Wide Committee to the Governor's Local Affairs Study Commission, December 1964.

2. Poundstone I (1974): Colo. Const. Art. XX, Sec.1

   - Applies only to Denver
   - Effectively blocked Denver's ability to undertake further annexation: required majority vote of a six member boundary control commission: three from Denver and one each from Adams, Arapahoe and Jefferson Counties.

- In addition, no property located in these three counties could be annexed by Denver unless approved by a unanimous vote of all members of the Board of County Commissioners of the county in which the land is located.

- Unaffected: Denver's ability as a county to change its boundaries pursuant to Article XIV, Section 3, Colorado Constitution and C.R.S. 30-6-100.3, *et seq.,* (still requires approval by electors in the county from which land is proposed to be removed for addition to Denver). This procedure was used by Denver in 1988 to annex the site in Adams County for Denver International Airport.

3. Poundstone II (1980): Colo. Const. Art. II, Sec. 30

- Applies to all Colorado municipalities

- Imposed three alternative conditions, at least one of which must exist before an unincorporated area may be annexed:

  - Approval of the annexation by vote of landowners and registered electors of the area to be annexed;

  - Petition for annexation signed by more than 50% of the land owners who own more than 50% of the land; or

  - The area is entirely surrounded by or is solely owned by the annexing municipality.

C. Basic Principles of Annexation

- **Annexation can take place in three ways:**

  - Landowner petition (a contractual relationship which can be memorialized in an agreement separate from the petition) signed by more than 50% of the landowners [*Colo.Const.Art II Sec30(1)(b)*] who own more than 50% of the land C.R.S. 31-12-107(1).

  - Annexation election, in which only landowners and registered electors in the area may vote. Colo.Const.Art II Sec. 30(1)(b); C.R.S. 31-12-107(2). Note: a few municipalities require an election for all annexations.

  - Unilateral annexation of enclave or municipally owned land: C.R.S. 31-12-106.

  - **"Landowner"** means the owner in fee of the surface estate, not the owner of the mineral estate if severed. C.R.S. 31-12-103(6). Joint tenant landowners are counted individually. Rice v. City of Englewood, 362 P.2d 557 (Colo.1961). As are tenants in common. BOCC v. Denver, 566 P.2d 335 (Colo.1977).

- ***One-sixth boundary contiguity*** must exist between municipality and property to be annexed: C.R.S. 31-12-104(1)(a).

  - Configuration of the parcel to be annexed is not relevant to review.

- Roads, water bodies and most government lands may be “skipped” for purposes of establishing the required contiguity. (County roads are not “county owned open space” and thus may be skipped.) BOCC v. Aurora, 62 P.3d 1049 (Colo.App.2002).

- Existence of contiguity satisfies the "community of interest" requirement of C.R.S. 31-12-104(1)(b).

- Prior noncontiguous annexations render subsequent annexations relying upon those annexations void ab initio. C.R.S. 31-12-104(2).

- **Establishing eligibility**

  - Series/simultaneous annexation of streets, rights-of-way, etc. permitted: C.R.S. 31-12-104(1)(a); 105(1)(e).

  - No division of property held in "identical ownership," without landowner consent unless separated by a “dedicated street, road or other public way;" written consent also required to annex 20 acres or more in identical ownership valued in excess of $200,000. C.R.S. 31-12-105(1)(a&b).

  - No annexation of property for which annexation proceedings have been initiated by another municipality (more on this later). C.R.S. 31-12-105(1)(c).

  - No annexation which will detach property from a school district without written consent of the district. C.R.S. 31-12-105(1)(d).

  - No annexation to expand municipal boundaries greater than 3 miles in “any one year.” C.R.S. 31-12-105(1)(e)(I).

  - Three mile plan required. C.R.S. 31-12-105(1)(e)(I).

  - Flagpole annexations must permit annexation of abutting property "under the same or substantially similar terms and conditions." C.R.S. 31-12-105(1)(e)(II).

  - If annexing a portion of a street or alley, must annex the entire width. C.R.S. 31-12-105(1)(f).

  - Annexation shall not deny reasonable access to landowners, easement owners or franchise owners adjoining a platted street or alley that has been annexed and is not bounded on both sides by the municipality. C.R.S. 31-12-105(1)(g).

  - Power of attorney not sufficient for annexation election. C.R.S. 31-12-105(1) (h).

- **Annexation Impact Report**

  - Required for annexations over 10 acres, unless waived by board of county commissioners. C.R.S. 31-12-108.5.

- **Notice and Hearing**

- Required except for enclaves [Notice only; no hearing: C.R.S. § 31-12-106(1)] and municipally owned property. C.R.S. 31-12-108; 109.

D. C.R.S. 31-12-105(1)(e) imposes two separate "three mile" limitations:

1. No annexation may have the effect of extending a municipal boundary more than three miles in any one year. See, Town of Berthoud v. Town of Johnstown, 983 P.2d 174 (Colo.App.1999) Letting stand a district court order that "one year" was a running 12 months, but see, C.R.S. 2-4-107: "year" defined as a "calendar year."

2. As a precondition to final adoption of an annexation ordinance within the three mile area outside present municipal boundaries, the municipality must have in place a plan for that area, in the nature of a comprehensive or master plan.

   - The statute does not require that the three-mile plan be adopted prior to submission of an annexation petition; instead, it must be in place "prior to completion of any annexation within the three mile area. . ."; thus, prior to final action on the annexation ordinance and recording with the clerk and recorder under C.R.S. 31-12-113(2).

   - The information required for a three mile plan is relatively limited. The plan must generally describe the proposed location, character and extent of:

     - subways, bridges
     - waterways, waterfronts
     - parkways, playgrounds, squares, parks
     - aviation fields
     - other public ways, grounds, and open spaces
     - public utilities
     - terminals for water, light, sanitation, transportation and power to be provided by the municipality [*not such utilities provided by others*]

     This requirement can be satisfied by including a three mile plan element in the comprehensive plan. See, C.R.S. 31-23-206(1);(2). The three mile plan must be updated at least once annually.

E. Landowner Consent or Voter Approval Required

- With the limited exception of municipally-owned property and property which has been wholly surrounded by the municipality for three years, landowner consent is required for a valid annexation petition. This consent is obtained either by: (1) signature on an annexation petition (at least fifty percent of the landowners, owning at least fifty percent of the land), or (2) a successful election, in which only landowners and registered electors may vote. C.R.S. 31-12-107; 112.

- For the purposes of the statute, "landowner" means the owner in fee of the surface estate, not the owner of the mineral estate if severed. C.R.S. 31-12-103(6).

- Landowner consent on an annexation petition may be withdrawn prior to final action; such a withdrawal deprives the municipality of power to complete the annexation. Town of Superior v. Midcities Co., 933 P.2d 596 (Colo. 1997).

- Many municipalities have required, as a condition to providing water or sewer service outside their boundaries, that the property owner sign a power of attorney granting the municipality the right to consent, on their behalf, to annexation when, as, and if the property becomes eligible for annexation in the future. House Bill 1061 (1996) eliminated the use of powers of attorney by municipalities to "vote" a parcel of property in an annexation election. C.R.S. 31-12-105(1)(h).

- In 1999, the statute was amended to limit the effective term of a power of attorney for use in an annexation petition to five years. C.R.S. 31-12-107(8).

F. Achieving Continuity: Flagpoles and Other Configurations

1. One-Sixth Boundary Requirement Generally

- The basic requirement that the property to be annexed must have at least a one-sixth boundary contiguity with existing municipal boundaries appears straightforward: *"…not less than one-sixth of the perimeter of the area proposed to be annexed is contiguous with the annexing municipality."* C.R.S. 31-12-104(1)(a).

- C.R.S. 31-12-104(1)(a) was amended in 1987 to confirm as legitimate the longstanding practice of annexing one or more parcels in a series, considered simultaneously, in order to annex property which, taken as a whole, does not have the requisite one-sixth contiguity.

- *"Within said three mile area, the contiguity required by Section 31-12-104(1)(a) may be achieved by annexing a platted street or alley, a public or private right-of-way, a public or private transportation right-of-way or area, or a lake, reservoir, stream, or other natural or artificial waterway."* C.R.S. 31-12-105(1)(e).

- In using a street to serve as the "pole" to reach, and thus annex, the desirable "flag" of property, it is required that the municipality also annex the "pole." Board of County Commissioners v. City and County of Denver, 543 P.2d 521 (Colo. 1975). Use of a street as the "pole" does not eliminate the application of the one-sixth contiguity requirement to the perimeter of the "pole." Board of County Commissioners v. City of Lakewood, 813 P.2d 793 (Colo. App. 1991).

- The shape and size of the parcel ultimately annexed, whether in a "flagpole" configuration or otherwise, is not relevant to its eligibility for annexation. Board of County Commissioners v. City and County of Denver, 548 P.2d 922 (Colo. 1976); Board of County Commissioners of County of Arapahoe v. City of Greenwood Village, 30 P.3d 846 (Colo. App. 2001).

- In 2001, C.R.S. 31-12-105(1)(e) was amended to grant certain rights to property owners abutting the proposed "pole," giving them a time-limited opportunity [90 days maximum] to be annexed along with the "flag." This opportunity exists only until forty-five days prior to the public hearing on the main annexation itself (creating some timing problems for notice and hearing if such owners elect to petition for annexation). The annexing municipality is required to provide mailed notice to these abutting landowners of their right to annex. The abutting property owners must

still submit an annexation petition and demonstrate the required one-sixth contiguity. Significantly, these owners may annex only *"upon the same or substantially similar terms and conditions"* as the main annexation. It is not clear whether this change in statute will either discourage flagpole annexations or result in abutting landowners taking advantage of the opportunity thus presented to annex.

- Disconnection and re-annexation to satisfy contiguity requirement is acceptable. BOCC v. Greenwood Village, supra, 30 P.3d 846@849.

2. Series/Simultaneous Annexations

- The statutory basis for series/simultaneous annexations is C.R.S. 31-12-104(1) (a), last sentence:

> Subject to the requirements imposed by C.R.S. 31-12-105(1) (e), contiguity may be established by the annexation of one or more parcels in a series, which annexations may be completed simultaneously and considered together for the purposes of the public hearing required by Sections 31-12-108 and 31-12-109 and the annexation impact report required by Section 31-12-108.5.

- Must each individual annexation in a series/simultaneous annexation be supported by an individual annexation petition? A review of the statute and case law does not support this notion. C.R.S. 31-12-107(1)(a) permits "the landowners of more than 50% of the area excluding public streets and alleys, meeting the requirements of Sections 31-12-104 and 105" to petition. The petition must allege ownership of more than 50% of the territory to be annexed, exclusive of streets and alleys." C.R.S. 31-12-107(1)(c)(III). See also, BOCC v. Aurora, supra, 62 P.3d 1049 at 1055-56, construing Colo.Const.Art.II Sec.30(1)(b).

- The impact of this distinction is significant: so long as there is some private land associated with any annexation parcel in the series, the petitioner can claim that it is the owner more than 50% of the land, exclusive of streets and alleys, with respect to the entire series/simultaneous annexation. This has permitted series/simultaneous flagpole annexations of considerable length.

- The references to annexations in the statute are often in the plural, such as "annexation of one or more parcels in a series, which **annexations** may be completed simultaneously." The references to annexation petition are in the singular, except for the heading of C.R.S. 31-12-107 itself.

- If the statute is plain and its meaning is clear, it must be interpreted as written. Casados v. City and County of Denver, 832 P.2d 1048 (Colo.App. 1992). It is only if the statute is ambiguous that the court may look beyond the words to such things as the objects ought to be obtained, the circumstances, legislative history and consequences of a particular construction. C.R.S. 2-4-203. It appears that the statute permits a single annexation petition, by a private landowner to support a series/simultaneous annexation including multiple parcels consisting exclusively of "public streets and alleys."

G. Enclave Annexations.

- When an unincorporated area has been entirely contained within the boundaries of a municipality for at least three years, the municipality may annex the property by ordinance without regard to the eligibility requirements in Colorado Revised Statute § 31-12-104, the limitations in Colorado Revised Statute § 31-12-105, or the hearing requirements of Colorado Revised Statute § 31-12-109. Notice under Colorado Revised Statute § 31-12-108(2) must still be given. This enclave annexation technique is not available if any boundary of the enclave consists, at the time of annexation, of only a public right-of-way. Instead, the municipality must truly surround the enclave. The annexing ordinance must state that the area proposed to be annexed is owned by the annexing municipality and is not solely a public street or right-of-way. Railroad rights of way are not "public rights of way, including streets and alleys. Accordingly, railroad rights of way may be used to satisfy the enclave test of Colorado Revised Statute § 31-12-106(1.1).

- Notice that Colorado Revised Statute § 31-12-108.5 (impact report) is not exempted for enclave annexations, nor for annexation of municipally-owned land.

- Any IGA addressing enclave annexations must be filed with the county clerk and recorder.

- A private owner may force an enclave annexation. Colorado Revised Statute § 31-12-107(5) provides:

    - If a petition is filed pursuant to subsection (1) or (2) of this section and the territory sought to be annexed meets the specifications of section 31-12-106(1), the governing body of the municipality with which the petition is filed shall thereupon initiate annexation proceedings pursuant to the appropriate provisions of section 31-12-106(1). In the event that any governing body fails to initiate such annexation proceedings within a period of one year from the time that such petition is filed, annexation may be effected by an action in the nature of mandamus to the district court of the county where the land to be annexed is located, and the petitioner's court costs and attorney fees incident to such action shall be borne by the municipality.

    - At least one district court has held this section to require that a municipality is required to annex a qualifying enclave if petitioned by the enclave owner, even when the property is no longer a qualifying enclave at the time of annexation.

- The enclave must be a "true" enclave as stated in Colorado Revised Statute § 31-12-106(1.1)(a):

    - No enclave may be annexed pursuant to subsection (1) of this section if:

      (I) Any part of the municipal boundary or territory surrounding such enclave consists *at the time of the annexation of the enclave* of public rights-of-way, including streets and alleys that are not immediately adjacent to the municipality on the side of the right-of-way opposite to the enclave. (emphasis supplied)

- Note the language "at the time of the annexation of the enclave," implying that while the "area" must have been "so surrounded for a period of not less than three years," only at the time of annexation of the enclave itself may the nature of that "surround" not consist only of a right-of-way. May an enclave consist of less than the entire area which has been surrounded for the requisite three years? Notice the language of the statute: "When any unincorporated area is entirely contained within the boundaries . . . the governing body may annex such territory . . . if said area has been so surrounded for . . . three years . . . ." Also note that "enclave" is defined in

Colorado Revised Statute § 31-12-103(4) as "an unincorporated area of land entirely contained within the boundaries of the annexing municipality." Both references would appear to allow less than an entire enclave to be annexed under the expedited process. If less than the entire enclave is annexed, does the three-year clock restart as to the remainder? The better view is that if only part of the enclave is annexed, the remainder does not thereby lose its three-year eligibility. While no appellate case law exists on this point, if the intent of the three-year prerequisite for unilateral annexation of enclaves is that, having been surrounded for that period eliminates the need for a petition, this should apply for all the land which has been so surrounded.

H. Municipally-Owned Land

The statute expressly permits annexation of unincorporated land owned by the annexing municipality, by ordinance, without notice and hearing. The property still must have the required one-sixth contiguity under Colorado Revised Statute § 31-12-104 and meet the requirements of Colorado Revised Statute § 31-12-105 and section 30(1)(c) of Article II of the Colorado Constitution (Poundstone II). The annexing ordinance must state that the area proposed to be annexed is owned by the annexing municipality and is not solely a public street or right-of-way.

I. Zoning of Land while Annexation is Underway; Zoning of Newly Annexed Land; subdivision of Land while Annexation is Underway

- An annexing municipality may institute zoning or subdivision proceedings for the area proposed to be annexed at any time after a petition for annexation or petition for annexation election has been found to meet the requirements of the statute. The proposed zoning or subdivision approval may not become final, however, before the date that the annexation ordinance is adopted on final reading. Zoning must be completed within 90 days after the effective date of the annexation ordinance.

- Most annexations occur simultaneously with zoning and subdivision or planned unit development (PUD) review, as described above. To the extent this is not done, the requirements of Colorado Revised Statute § 31-12-115(2) apply and the area annexed must be brought under the municipality's zoning ordinance within 90 days from the effective date of the annexation ordinance. Failure to do so arguably reinstates county zoning until the municipality acts. For example, immediately after an annexation without a companion zoning ordinance, a building permit could be demanded based on the previous county zoning. During the 90-day period, the annexing municipality may refuse to issue any building or occupancy permits for any portion of the newly annexed area. Any attempted "universal" zoning provision that automatically applies a uniform zoning classification to all lands subsequently annexed is deemed void. This has the effect of requiring the municipality to affirmatively act to zone each property as it is annexed. Subdivisions and building permits authorized by the annexing municipality in an area where annexation is undergoing judicial review are expressly recognized as valid, even though the annexation itself may be subsequently declared invalid.

- Colorado Revised Statute § 31-12-115(6), added in 2004, prohibits the adoption or enforcement of any restriction on rights-of-way within the annexed area if the same have been customarily or regularly used for ""movement of any agricultural vehicles and equipment," to the extent such use is in existence at the time of annexation, and for the period the land remains in that use. Zoning of the annexed area for other than agricultural uses does not affect the restriction. Notice to adjacent property owners is required 30 days prior to adoption of an ordinance or regulation "affecting the right-of-way." Significantly, municipalities are permitted to adopt and enforce traffic regulations

that are "consistent with the customary or regular use of the right-of-way or are necessary for the safety of vehicular and pedestrian traffic . . ."

- The question often is raised whether a municipality may contract by annexation agreement that the property will be given certain zoning if the annexation ordinance is adopted. While most annexation agreements contain such agreements, it should be noted that the municipality has no land use or police power authority over the property until it is finally annexed and becomes part of the municipality. Thus, any agreement to zone property entered into before the authority to so zone may be argued to be *ultra vires*, or outside the authority of the municipal governing body. Such an agreement might result in circumventing the municipality's own adopted zoning process — for instance, by stipulating zoning without the full process of notice and hearing, planning and zoning review, etc. — thus creating an additional procedural problem.

- Obviously, the governing body may agree to "consider" a certain zoning density in the event annexation is taken to completion. In addition, any implications of "contract zoning" or *ultra vires* action will be eliminated if the annexation agreement states that zoning is not guaranteed and that the municipality retains its full discretion to zone the property following the public hearing. The agreement should clearly state this is for initial zoning upon annexation and is not a promise to maintain that zoning in perpetuity. In addition, the agreement should include a statement that it does not constitute a waiver of governmental or legislative authority or an abridgement of the police power. Once the annexation has been completed, the municipality may complete the zoning of the property and may even agree not to change that zoning for a prescribed period of time through a development or vested rights agreement under Colorado Revised Statute §§ 24-68-101 et seq. Often, the petitioning landowner reserves the right to withdraw the petition and prevent the recording of the annexation plat if the desired zoning is not granted. Most annexation agreements provide that the annexation ordinance and map may not be filed with the clerk and recorder under Colorado Revised Statute § 31-12-113 (and thus the annexation never becomes effective) unless the agreed zoning is granted.

J. Jurisdiction for Zoning Purposes: Resolving the 60 Day Problem

- *C.R.S. 31-12-115:* "The annexing municipality may institute the procedure *[outlined in state statutes or municipal charter to make land subject to zoning]* nor *[outlined in its subdivision regulations to subdivide land in the area proposed to be annexed]* at any time after a petition for annexation or a petition for an annexation election has been **found to be valid** in accordance with the provisions of Section 31-12-107." (emphasis supplied.)

- C.R.S. 31-12-107(I)(f) requires prompt action on a submitted petition: The clerk shall refer the petition to the governing body as a communication. The governing body, without undue delay, shall then take appropriate steps to determine if the petition so filed is substantially in compliance with this subsection (1).

- A petition is "found to be valid" likely by a finding of "substantial compliance," as referenced in 31-12-107(1)(g) [*petition for annexation*] or 31-12-107(2)(e) [*petition for annexation election*], and C.R.S. 31-12-107(I)(f).

- "Substantial compliance," is in turn established by resolution under C.R.S. 31-12-108(1):

> **As a part** of the resolution initiating annexation proceedings by the municipality or of a **resolution finding substantial compliance of an annexation petition** or of a petition for an annexation election, the

governing body of the annexing municipality shall establish a date, time and place that the governing body will hold a hearing to determine if the proposed annexation complies with sections 31-12-104 and 105 or such parts thereof as may be required to establish eligibility under the terms of this part one. **The hearing shall be held not less than 30 days nor more than 60 days after the effective date of the resolution setting the hearing.** (emphasis supplied.)

- Thus, under the statute, annexation and zoning may not be initiated (and, arguably, the municipality has no jurisdiction to do so) until the substantial compliance resolution is adopted. However, if that resolution must also establish a hearing within 60 days, the municipality only has that time to bring the zoning and subdivision applications to a final stage. For a large annexation this is not nearly enough.

- What to do? At latest count, there are four alternatives:

    1. Set the annexation hearing, then simply keep continuing it under C.R.S. 31-12-108(3) [*after taking 1 hour of testimony*] until the land use applications catch up. This is the most common approach.

    2. Act by ordinance to permit the Council to table an annexation petition for up to ____ days/months after receiving it under C.R.S. 31-12-107(1)(f) and before adopting the resolution of substantial compliance under C.R.S. 31-12-108, all in order to, in the words of the ordinance, "enable the land use applications to be processed to a final stage." Does this really solve the jurisdictional problem? Only if the municipality may confer land use jurisdiction upon itself for property not within its boundaries, separate and apart from the jurisdiction conferred by C.R.S. 31-12-115.

    3. Act by ordinance to grant the governing body such additional time as it wishes between the adoption of the resolution of substantial compliance and the date of eligibility hearing (and customary second resolution under C.R.S. 31-12-110) on the annexation itself. This still relies on the municipality having the authority to vary the terms of the statute, but does not raise the jurisdictional question, since the resolution of substantial compliance will have been adopted and jurisdiction conferred under C.R.S.31-12-115.

    4. Adopt the resolution of substantial compliance under C.R.S. 31-12-108, set the hearing within the 60 day maximum, conduct the hearing and adopt the second resolution declaring the property eligible for annexation, but delay action on the annexation ordinance itself until the land use applications (and also likely the annexation agreement) have been brought to final form. This avoids the necessity of either taking a jurisdictional risk, or adopting an ordinance varying the terms of the statute. However it also means that the City Council or Board of Trustees must explain to members of the public at the "eligibility hearing," that it is not really annexing the property yet, that all of their comments, while important, are not really going to be acted on at this time.

    For statutory municipalities, options 2 and 3 are not available.

K. Effective Date of Annexation-Required Filings

- Colorado Revised Statute § 31-12-113 establishes detailed filing requirements which must be followed before an annexation is effective:

    1. One copy of the annexation map and the original annexation ordinance are filed with the municipal clerk.

    2. Three certified copies of the ordinance and map are filed with the county clerk and recorder.

    3. The clerk and recorder in turn files one copy with the division of local government and one copy with the Colorado Department of Revenue.

- These requirements are substantially repeated at Colorado Revised Statute § 24-32-109, concerning the functions of the Division of Local Government, Colorado Department of Local Affairs. Both statutes declare that the annexation is not effective until the filings with the county clerk and recorder have been made. Once the filings are made, the annexation is effective "upon the effective date of the annexing ordinance." It is common for annexation agreements to provide that the filings are not to be made, and thus the annexation is not effective, if the zoning requested in the petition is not approved. The Colorado Court of Appeals has held that substantial compliance with this filing requirement is sufficient to satisfy the two statutes. Importantly, the effective date of the annexation *ordinance* is distinct from (and precedes) the effective date of the *annexation* which is the date the ordinance and map are actually filed with the county. Accordingly, municipal officials should include these requirements in their "annexation calendar" suggested above, and scrupulously follow them.

L. Annexation Agreements

- Once the Council / Board of Trustees has determined that requirements of C.R.S. 31-12-104 and 105 have been met and that an election is not required, it may proceed to annex the area by ordinance, unless it chooses to impose "additional terms and conditions" upon the annexation, in which case an election must be held. C.R.S. Section 31-12-101(1)(g). No election is required if 100% of landowners petition and have agreed to the conditions.

- C.R.S. 31-12-106(4), 31-12-107(4), 31-12-111, 31-12-112(1) and 31-12-121 specifically contemplate that annexation agreements may be entered into. Such agreements are judicially enforceable. The Colorado courts have upheld the imposition of conditions by annexation agreement. City of Aurora v. Andrew Land Company, 490 P.2d 67 (Colo. 1971); Lone Pine Corp. v. City of Ft. Lupton, 653 P.2d 405 (Colo. App. 1982).

- An annexation agreement is a contract. Terms and conditions may also be imposed by a memorandum of agreement. C.R.S. Section 31-12-112(2).

- Example developer/annexor obligations: dedicate and improve roads, install water and sewer lines, pay fees for water transmission, make storm drainage improvements, participate in bridge costs, donate land for public purposes; construct necessary public improvements; dedicate surface and nontributary groundwater.

- Example municipal obligations: provide water and sanitary sewer service to the annexed lands; initially zoning the property to the agreed-upon zone category.

- The annexation agreement should affirmatively reserve the right of the municipality to rezone the property in the future. A municipality cannot be contractually bound never to rezone property,

although Colorado's vested property rights act, C.R.S. 24-68-101, *et seq*., may impose other constraints.

M. Challenge and Enforcement

Statutory Requirements & Limitations

- C.R.S. 31-12-116 provides the only means for challenging a municipal annexation. This opportunity is limited to a sixty day period following the effective date of the annexation ordinance. The challenge right is strictly limited to:

  - Any landowner or qualified elector in the area annexed;

  - the board of county commissioners of any county governing the area annexed; or

    any municipality within one mile of the area annexed.

- Annexation is a legislative act; rezoning is quasi-judicial. This difference leads to interesting problems when (as is commonly the case) an annexation petition is accompanied by a request for rezoning:

  - The annexation ordinance and agreement, being concerned with a **legislative** matter, can be negotiated through the liberal use of *ex-parte* contacts. The agreement can be challenged at any time by declaratory judgment; challenge to the annexation ordinance itself is time limited (sixty days) and plaintiff-limited (landowner; county; other municipalities within one mile). C.R.S. 31-12-116.

  - The rezoning request is **quasi-judicial**; *ex-parte* contacts are prohibited; challenge to the rezoning by certiorari review is strictly limited to within thirty days of final action.

- In 1991, the legislature closed an interesting loophole created by the sixty day limitation, adding subsection C.R.S. 31-12-104(2). The new subsection declared "noncontiguous," "disconnected municipal satellites" located more than three miles from the annexing municipality to be void *ab initio*, and removed the sixty day limitation from actions brought to challenge such attempted annexations. The subsection goes on to similarly void any annexation subsequently relying on the initial (void) annexation attempt. Review is available under this sub-section only to a municipality within one mile of the challenged annexation, and only if the challenging municipality has a three mile "plan in place," as required by C.R.S. 31-12-105(1)(e). Town of Berthoud v. Town of Johnstown, 983 P.2d 174 (Colo. App. 1999).

- Litigation between the City of Aurora and Douglas County has highlighted the role of the board of county commissioners governing the area proposed to be annexed. C.R.S. 31-12-104(1)(a) provides, *inter alia,* that *"[c]ontiguity shall not be affected by the existence of a platted street or alley, a public or private right-of-way or area, public lands, whether owned by the state, the United States, or an agency thereof,* ***except county-owned open space****, or a lake, reservoir, stream or other natural or artificial waterway between the annexing municipality and the land proposed to be annexed."* (emphasis supplied). This "skipping rule" allows the annexing municipality to ignore, for purposes of contiguity, intervening lands of the types described, with the exception of "county-owned open space." The Douglas County Board of County

Commissioners, faced with a pending (and, in the county, unpopular) Aurora annexation, promptly adopted a resolution declaring two intervening county roads to be "county-owned open space," and thus land which destroyed the required contiguity. The district court agreed. The Colorado Court of Appeals reversed the district court, holding that active county roads were not "open space." BOCC v. Aurora, 62 P.3d 1049 (Colo.App.2002).

- Douglas County and the City of Aurora have also litigated the extent to which a county may use regulations enacted under the Areas and Activities of State Interest Act, C.R.S. 24-65.1-101 *et seq*.. The Court of Appeals held in 2001 that the county lacked authority to require an annexing developer to obtain a county permit under such regulations before it could seek to annex to Aurora. Board of County Commissioners of the County of Douglas v. Gartrell Investment Company, LLC, 33 P.3d 1244 (Colo. App. 2001).

Conflicting Annexation Claims of Two or More Municipalities

- C.R.S. 31-12-114 governs the procedure for resolving these claims. Subsection (1) provides:

> At any time during a period of notice [of the annexation hearing] given by a municipality pursuant to section 31-12-108, any other municipality may adopt a resolution of intent pursuant to section 31-12-106 or receive a petition for annexation or a petition for an annexation election pursuant to section 31-12-107 with the area partly or wholly overlapping the area proposed for annexation by the first municipality. If this occurs, the respective rights of the several municipalities shall be determined in accordance with an election as provided in this section.

- For the rather complicated definition of when proceedings for annexation have been "commenced," see C.R.S. 31-12-105(1)(c), stating that no annexation under C.R.S. 31-12-106 or C.R.S. 31-12-107:

> *". . . shall be valid when annexation proceedings have been commenced for the annexation of part or all of such territory to another municipality, except in accordance with the provisions of section 31-12-114. For the purpose of this section, proceedings are commenced when the petition is filed with the clerk of the annexing municipality or when the resolution of intent is adopted by the governing body of the annexing municipality if action on the accepting of such petition or on the resolution of intent by the setting of the hearing in accordance with section 31-12-108 is taken within 90 days after the said filings, if an annexation procedure initiated by petition for annexation is then completed within 150 days next following the effective date of the resolution accepting the petition and setting the hearing date and if an annexation procedure initiated by resolution of intent or by petition for an annexation election is prosecuted without unreasonable delay after the effective date of the resolution setting the hearing date."*

- Once it is determined that there are conflicting annexation claims, C.R.S. 31-12-114(2) provides that proceedings for annexation by both municipalities are "held in abeyance pending the holding of an election of the qualified electors resident within such area or as described in subsection (4) of this section . . . "

- The second municipality is obliged to petition the district court for the election. The petition must be filed within 30 days after the second municipality's resolution of intent or the date of the filing of the petition for annexation with the second municipality. Note: the date of filing of the petition will generally control, and this is underscored by C.R.S. 31-12-105(1)(c), unless it is annexation of an enclave or municipally owned land under C.R.S. 31-12-106.

- At the election, "qualified electors and qualified nonresident landowners" in the area claimed by both municipalities may vote. A likely "qualified nonresident landowner" would be the Colorado Department of Transportation, when a series/simultaneous annexation relies on segments of state highway. CDOT typically will not sign annexation petition; it is unlikely it would vote in an election under C.R.S. 31-12-114. If the overlap area consists solely of CDOT right-of-way, the election may result in a tie (0 to 0), in which case the court must order both annexations void, barring both municipalities from continuing with the current annexation proceedings insofar as they relate to such disputed area." C.R.S. 31-12-114(6).

- Where the disputed area has less than two-thirds boundary contiguity with either municipality, the electors get two questions: for or against annexation, and for annexation to [*municipality 1*] or [*municipality number 2*].

- If less than 2/3 boundary contiguity, question 2 only.

- The election is decided by a majority of votes cast, except a three-quarters majority vote is required to defeat annexation to a municipality with more than two-thirds boundary contiguity of the total area proposed for annexation or the disputed part thereof. C.R.S. 31-12-115(9).

- Unless the area of overlap is more than one-third of the area proposed for annexation (inclusive of streets) to the first municipality, either municipality may proceed to annex the area not claimed by the other without waiting for the election. C.R.S. 31-12-115(10).

- Proceedings by one municipality to challenge the annexation of another where there are conflicting annexation claims are exclusively governed by C.R.S. 31-12-116. City & County of Denver, et al. v. Jefferson County District Court et al., 509 P.2d 1246 (Colo.1973); Berry Properties v. City of Commerce City, 667 P.2d 247 (Colo. App. 1983).

- No such suit may be brought prior to "the effective date of the annexing ordinance by the annexing municipality." C.R.S. 31-12-116(1)(a). This means that municipalities claiming the same territory must proceed through the annexation election process under C.R.S. 31-12-114 before commencing a challenge against each other, on whatever basis (including other defects in the annexation process).

- Of course, C.R.S. 31-12-116(2)(a)(II) continues to apply, requiring a motion for reconsideration within 10 days of the effective date of the ordinance finalizing the challenged annexation.

N. Required mediation of Certain Annexations

- Special mention is required of Colorado Revised Statute § 24-32-3209, entitled "comprehensive planning disputes-development plan disputes-mediation-list of qualified professionals to assist in mediating land use disputes-definitions."

- This statute, enacted in 2000 and amended in 2001 and 2003, can be easily overlooked by the municipal annexation practitioner, located as it is in an obscure location in Title 24 in the Colorado

Revised Statutes. Failing to pay attention to this statute can have serious consequences. The statute requires mandatory mediation of certain planning disputes, including disputes over the proposed annexation of land. Specifically, the statute requires a municipality, upon receipt of an annexation petition, in some cases to refer the petition to other local governments for review and their potential objection before the annexing municipality may take any action on the petition. This requirement applies when the proposed annexation includes territory within the boundaries of a "development plan" (defined at Colorado Revised Statute § 24-32-3209(1)(c.5) to include plans approved by intergovernmental agreements) to which the annexing municipality is not a party, but notice of and copy of which has been received by that municipality.

- A common circumstance under which the requirements of this statute would be triggered would be an IGA between Municipality No. 1 and the county regarding Municipality No.1's urban growth area. Municipality No. 2, not a party to the IGA, but on notice of it, receives a petition for annexation for property within the area covered by the IGA. The statute would apply and would require the following procedure:

    1. Municipality No. 2 must provide notice and a copy of the annexation petition to all parties to the IGA (the county and Municipality No. 1).
    2. The parties to the IGA have 30 days after receiving their copies of the petition to file written objections with Municipality No. 2.
    3. The written objections may include a request (which may not be refused) that municipality No. 2 participates in mediation of the "dispute."
    4. The petition may not be referred to Municipality No. 2's governing body under Colorado Revised Statute § 31-12-107(1)(4) for action until the required mediation is complete or 90 days have passed since the request for mediation was made.
    5. In lieu of mediation, the parties may enter into an IGA to resolve the dispute.

- The Colorado Department of Local Affairs is required to maintain a list of qualified mediators. While the statute only requires mediation, in our example Municipality No. 2 would eventually be able to proceed with the annexation. However, it would be subject to a delay of up to 120 days before its governing body could even take action to determine substantial compliance and set a hearing date on the annexation petition. During that time, Municipality No. 1 could accept a conflicting petition for annexation under Colorado Revised Statute § 31-12-114, further complicating the situation.

- It is obvious that in addition to complying with intergovernmental agreements to which it is a party, the annexing municipality must be aware of those agreements to which it is *not* a party, but which cover territory that may be the subject of an annexation petition

O. Disconnection.

- Municipalities are authorized to disconnect territory from within their municipal boundaries through several different statutory procedures. There are four separate statutory procedures for disconnection:

    1. Disconnection of territory because of failure to serve: Colorado Revised Statute § 31-12-119.

2. Disconnection by ordinance-statutory cities and towns: Colorado Revised Statutes §§ 31-12-501 to 503.
3. Disconnection by court decree - statutory cities: Colorado Revised Statutes §§ 31-12-601 to 605.
4. Disconnection by court decree-statutory towns: Colorado Revised Statutes §§ 31-12-701 to 707.

- It is important to note that all of these statutes require some form of landowner consent or landowner initiation of disconnection:

1. Colorado Revised Statute § 31-12-119: landowners must petition governing body for disconnection for failure to serve (and the procedures of Colorado Revised Statutes §§ 31-12-601 or 31-12-701 are used).
2. Colorado Revised Statutes §§ 31-12-501 et seq.: landowner applies to the governing body for an ordinance disconnecting the property.
3. Colorado Revised Statutes §§ 31-12-601 et seq.: landowner petitions the district court (statutory cities).
4. Colorado Revised Statutes §§ 31-12-701 et seq.: landowner petitions district court (statutory towns).

- In all the statutory disconnection proceedings, not only is landowner consent or landowner initiative required but significantly, each procedure details the debt and property tax impact of the disconnection. This is important because disconnection moves the property into the unincorporated county, and the statutes require that any taxes lawfully assessed against the property for the purpose of paying indebtedness lawfully contracted by the governing body municipality while the land was within the limits of the community which remains unpaid continues to be an indebtedness of the property and must be collected by the county treasurer. The effect of disconnection is to impose new and different tax burdens on the property as well is to require payment of those burdens contracted while the property was in the municipality.

- Disconnection for Failure to Serve: The owner or owners of any tract or contiguous tracts of land consisting of more than five acres and located on the boundary of a municipality may petition for disconnection from the municipality if municipal services have not been provided to the area within three years after annexation on the same terms and conditions as the rest of the municipality. The procedures for such disconnection are set forth in Colorado Revised Statutes §§ 31-12-601 to 31-12-707, depending upon whether the municipality involved is a city or a town. Disconnection in this circumstance is accomplished by court decree, rather than by ordinance. The Colorado Court of Appeals has held that a municipality may not shield itself from the effect of Colorado Revised Statute § 31-12-119 by imposing a condition on an annexation that the municipality would not be required to supply services to the annexed area.

- Disconnection by Ordinance: While property owners may petition the district court for disconnection from statutory cities and towns under Colorado Revised Statutes §§ 31-12-601 et seq. and 31-12-701 et seq., the most available means by which a municipality may disconnect property is Colorado Revised Statutes §§ 31-12-501 et seq. ""disconnection by ordinance-statutory cities and towns."" Home rule municipalities may also follow this procedure by enacting a simple code requirement that disconnection from such municipality by petition

shall follow the procedures set forth in Colorado Revised Statutes §§ 31-12-501 et seq. This is advantageous, since that statute allows a municipality, upon the request of a property owner, to disconnect property without the more cumbersome procedure of the court proceedings in the other two mechanisms.

- Under Colorado Revised Statute § 31-12-501, the owner of a tract of land "within and adjacent to the boundary of a municipality" may apply to the governing body for disconnection. A copy of this application is provided to the board of county commissioners and the board of directors of any affected special district, who may request a meeting with the property owner and the governing body of the municipality to "discuss and address any negative impacts on the County that would result from the disconnection." Colorado Revised Statute § 31-12-501(2)(a). Importantly, whether or not such a meeting is requested, or if requested, conducted, the municipality's governing body must simply give consideration to the comments of the county commissioners and/or special district directors, but is not required to address those comments in any particular way. Nor may the board of county commissioners or the special district block or impede the disconnection. The requirement of consultation is simply that.

- Once any required consultation is completed as described above, the municipality may proceed to consider the request for disconnection, and "if such governing body is of the opinion that the best interest of the municipality will not be prejudiced by the disconnection of such tract, it shall enact an ordinance affecting such disconnection." This standard of review is very simple, and makes the question of disconnection one of the pure discretion of the municipal governing body. Colorado Revised Statute § 31-12-501(3). Once the disconnection ordinance is enacted, disconnection is immediately effective upon filing of the ordinance with the county clerk and recorder in essentially the same manner in which annexation ordinances are filed under Colorado Revised Statute § 31-12-113.

- The general procedure for disconnection under this statute is as follows:

  - The governing body adopts an ordinance amending the Municipal Code by the incorporation of Colorado Revised Statutes §§ 31-12-501 et seq., as the procedure for disconnection of property from the municipality by ordinance.
  - The municipality accepts an application from "the owner of a tract of land within and adjacent to the boundary" of the municipality, asking to have the property disconnected.
  - The governing body considers the application and if it is "of the opinion that the best interests of the municipality" would not be prejudiced by disconnection, it enacts an ordinance "effecting such disconnection."
  - Upon filing the ordinance and map with the county clerk and recorder, the property is disconnected from the municipality and returned to the unincorporated county.

- Disconnection by Petition and Court Decree: Under Colorado Revised Statutes §§ 31-12-601 et seq. and 31-12-701 et seq., the court petition and decree procedure is available only in limited circumstances, including disconnection of agricultural and farmland which has not yet been platted, and will not be platted for six years after the effective date of disconnection. Disconnection for failure to serve under Colorado Revised Statute § 31-12-119 is available, unless the municipality has services made available to the property on the same or similar basis as for the remainder of the municipality.

- Necessity of Landowner Consent: A home rule municipality could adopt a local code provision

designating Colorado Revised Statutes §§ 31-12-501 et seq., as the procedure for disconnection, so as to preclude the more complex district court proceeding of Colorado Revised Statutes §§ 31-12-601 et seq. and 31-12-701 et seq. Some home rule municipalities have done so. Could a home rule city disconnect property without landowner consent? Here, however, the home rule power collides with the property rights of the owners being disconnected:

- First, while not controlling disconnection, the Constitution (importantly for home rule municipalities) and the statute both require a form of landowner consent for *annexation* – either by petition or election.
- The only exception is annexation of enclaves and municipally owned land (the latter, by virtue of the City's ownership of the property, is really a consented annexation).
- The statute requires some form of landowner consent or landowner initiation of *disconnection*:
  - Colorado Revised Statute § 31-12-119: landowners petition governing body for disconnection for failure to serve (and the procedures of Colorado Revised Statutes §§ 31-12-601 et seq. or 31-12-701 et seq. are used).
  - Colorado Revised Statute § 31-12-501: owner must apply to the governing body
  - Colorado Revised Statute § 31-12-601: owner petition to district court
  - Colorado Revised Statute § 31-12-702: owner petition to district court

- With the single exception of an enclave annexation, any annexation or disconnection requires landowner consent for property to be placed under the jurisdiction of a different local government. In all of the statutory disconnection proceedings, not only is the owner consent or initiative required, but significantly, each procedure details the debt and real property tax impact of the disconnection. Again, the effect of disconnection is to impose new and different tax burdens on the property, as well as to require payment of those burdens that were on the property while it was in the city.

- Consequences of Disconnection: Disconnection restores the territory to the jurisdiction of the county for all purposes, including property taxation County land use control is restored, although to the extent vested rights were acquired while the property was within the municipality, those rights continue to be valid and enforceable. While uncommon, municipalities do occasionally disconnect property, returning it to the jurisdiction of the unincorporated county. Regarding the effect of disconnection on public streets, the Colorado Supreme Court has held that an ordinance disconnecting previously annexed areas was not sufficient to vacate a public street dedicated by subdivision at the time of annexation. The street in question therefore remained a public street, but control over the street passed to the county.

- While none of the disconnection statutes mention recording, the disconnection ordinance (or, if applicable court decree) and map should be filed with the county clerk and recorder in the same manner as annexation ordinances and maps under Colorado Revised Statute § 31-12-113.

TIMELINE AND PROCESS FOR ANNEXATION

The process for annexation of property showing the time frame for accomplishing the various requirements for an annexation under the Municipal Annexation Act, C.R.S. § 31-12-101, *et seq*.

Date	Action Required
	Petition for Annexation ("Petition") signed and submitted. Petition referred to Council by City/Town Clerk.
	Send notice by regular mail to landowners abutting the annexed road, advising of their right to petition for annexation on "the same or similar terms and conditions." C.R.S. § 31-12-105(1)(e.3).
1	City/Town Council adopts Notice of Public Hearing ("Notice") and Resolution of Intent to Annex ("Resolution of Intent"), Finding Substantial Compliance, and Setting Annexation Hearing.
3	Publish Notice and Resolution of Intent in newspaper of general circulation in the area proposed to be annexed. C.R.S. § 31-12-108(2).
10	Send a copy of the Notice, Resolution of Intent and Petition to the Board of County Commissioners, County Attorney, and any special districts and school districts serving the area proposed to be annexed. C.R.S. § 31-12-108(2).
10	Publish Notice and Resolution of Intent in newspaper of general circulation in the area proposed to be annexed. C.R.S. § 31-12-108(2).
10	City/Town begins preparation of Annexation Impact Report ("AIR") for filing with the Board of County Commissioners, pursuant to C.R.S. §31-12-108.5, unless the Board of County Commissioners waives the requirement, or the property to be annexed is ten acres or less. **].** The impact report must include the following:

1. A map or maps of the City/Town and adjacent territory, showing:
    a. Present and proposed boundaries of the City/Town in the vicinity of the annexation;
    b. The present streets, major trunk water mains, sewer interceptors and outfalls, other utility lines and ditches, and the proposed extension of streets and utility lines in the vicinity of the proposed annexation;
    c. The existing and proposed land use pattern in the areas to be annexed.
2. A copy of any draft or final annexation agreement.
3. A statement setting forth the plans of the City/Town for extending to or otherwise providing for, within the area to be annexed, municipal services performed by or on behalf of the municipality at the time of annexation.
4. A statement setting forth the method under which the City/Town plans to finance the extension of the municipal services into the area to be annexed.
5. A statement identifying existing districts within the area to be annexed.

6. A statement on the effect of annexation upon local-public school district systems, including the estimated number of students generated and the capital construction required to educate such students.

15 File AIR, if required, with the Board of County Commissioners.

17 Publish Notice and Resolution of Intent in newspaper of general circulation in the area proposed to be annexed. C.R.S. § 31-12-108(2).

24 Publish Notice and Resolution of Intent in newspaper of general circulation in the area proposed to be annexed. C.R.S. § 31-12-108(2).

30 Request certificate of publication from owner, manager or editor of newspaper. Add certificate to the record at annexation hearing. C.R.S. § 31-12-108(2).

35 City/Town Council conducts public hearing on annexation petition. C.R.S.§ 31-12-109.

35 After hearing, pursuant to C.R.S. § 31-12-110, City/Town Council adopts a resolution identifying findings of fact.

35 After hearing City/Town Council adopts Ordinance Approving Annexation. C.R.S. § 31-12-113.

35 After hearing City/Town Clerk signs Certificate of Annexed Plat.

36 Original Annexation Ordinance and one copy of the annexation map filed in the office of the City/Town Clerk. C.R.S. § 31-12-113(2)(a)(I).

36 Three certified copies of the annexation ordinance and map, containing a legal description, filed for recording with the County Clerk and Recorder. C.R.S. § 31-12-113(2)(a)(II)(A).

36 Effective date of Annexation. C.R.S. § 31-12-113(2)(b).

40 County Clerk and Recorder files one certified copy of the annexation ordinance and map with the Division of Local Government of the Colorado Department of Local Affairs. C.R.S. 31-12-113(2)(a)(II)(B).

40 County Clerk and Recorder files one certified copy of the annexation ordinance and map with the Department of Revenue. C.R.S. 31-12-113(2)(a)(II)(B).